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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE GUADALUPE SALINAS-
ALMAGUER,

Defendant and Appellant.

A122788

(Sonoma County
Super. Ct. No. SCR483474)

Jose Guadalupe Salinas-Almaguer was convicted by a jury of possession for sale of more than one kilogram of methamphetamine that was enhanced because he was personally armed with a firearm. Salinas-Almaguer argues there is no substantial evidence to support either his conviction or the firearm enhancement. He also contends the trial court erred when it declined to give pinpoint jury instructions he had requested on the elements of possession of drugs for sale, and denied his motions to compel disclosure of the identity of a confidential informant and seeking a new trial.

There was ample evidence from which the jury could conclude that Salinas-Almaguer had constructive possession of the methamphetamine and the firearm. There was no need for the requested pinpoint instructions. The trial court properly declined to disclose the identity of an informant who provided facts supporting issuance of a search warrant and the motion for new trial was properly denied. Accordingly, we find no error and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Pursuant to a search warrant, Detective Shawn Murphy searched a small one-bedroom apartment in Santa Rosa. On top of a dresser in the bedroom, there was a shoe box that contained paystubs made out to Salinas-Almaguer, a checkbook and other documents in his name. In drawers of the same dresser, Detective Murphy found a handgun wrapped in a shirt emblazoned with the logo of the company that had issued the paychecks to Salinas-Almaguer, \$2,500 in cash, and other documents in Salinas-Almaguer's name. In the bedroom closet, police found a jacket that contained an ounce of suspected methamphetamine, \$630 in cash, and a small amount of marijuana. On the closet floor was a plastic bag containing seven identification documents, including three resident alien cards and two social security cards.

With the help of a dog trained to detect narcotics, police also found plastic containers that contained a white crystalline substance hidden behind a baseboard under the bathroom sink. The only usable fingerprint on one of the containers was made by someone other than Salinas-Almaguer. Police also found a tire, a gas can, and a metal crock pot in the bathroom. Those items are all associated with the transportation and manufacture of methamphetamine. In the kitchen, police found two scales and a vacuum sealer with a roll of vacuum-sealer bags.

Detective Murphy met with the on-site manager for the apartment complex. In two photo line-ups conducted a year apart, the manager identified Salinas-Almaguer as the person who lived in the apartment. The rental agreement was in the names of Elizabeth Salinas and Jose Salinas, and the manager told Detective Murphy that another man was also living there near the time of the search. At trial, the apartment manager confirmed that Salinas-Almaguer lived in the apartment at the time of the search, and she saw his car parked there on that day. She said Salinas-Almaguer's brother also lived at the apartment, along with another man. Although she recognized their pictures on some of the alien cards found in the bedroom closet, the names on the cards did not match their photos. Elizabeth Salinas was no longer living there.

Approximately 2.68 pounds of methamphetamine was recovered from the apartment. Salinas-Almaguer was charged with possession for sale of more than one kilogram of methamphetamine, with an enhancement for being personally armed with a firearm. A detective who was qualified as an expert testified that based on the large amounts of drugs and cash, the firearm, and the scales and other equipment found in the kitchen and bathroom of the apartment, it was his opinion that the methamphetamine was possessed for sale. The jury found Salinas-Almaguer guilty as charged. The court denied his motion for a new trial and sentenced him to a ten-year prison term that included a three-year upper term for the possession for sale of methamphetamine, a three-year enhancement because the offense involved more than one kilogram, and a four-year enhancement for the personal arming allegation. Salinas-Almaguer timely appealed.

DISCUSSION

A. Sufficiency of the Evidence

Salinas-Almaguer argues “[t]he prosecution relied on little more than appellant’s paper connection to the apartment” to prove his guilt. Thus, he says, the evidence may have been sufficient to show he was at the apartment at some time, but nothing proved he had any connection to the drugs and paraphernalia found there or that he was there at or near the time the drugs were found. We disagree.

When we consider whether substantial evidence supports a judgment, we examine the whole record in the light most favorable to the judgment. We look for evidence that is reasonable, credible and of solid value that could support a reasonable jury’s conclusion that the defendant is guilty beyond a reasonable doubt. Even when the conviction rests upon circumstantial evidence, we presume the existence of every fact the jury could reasonably deduce. Although the jury must acquit a defendant when it finds that circumstantial evidence is susceptible of two interpretations, one pointing to innocence and the other pointing to guilt, it is the jury, not this court that must be convinced of the defendant’s guilt beyond a reasonable doubt. When the circumstantial evidence reasonably justifies the trial court’s finding of guilt, it makes no difference that we could also reconcile the evidence with a contrary result. (*People v. Kraft* (2000) 23

Cal.4th 978, 1053-1054.) “We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence.” (*People v. Maury* (2003) 30 Cal.4th 342, 403.) Applying these standards, we conclude Salinas-Almaguer has not shown grounds for reversal.

There was sufficient evidence from which the jury could conclude that Salinas-Almaguer had constructive possession of the drugs and the firearm found in the apartment. “Constructive possession occurs when the accused maintains control or a right to control the contraband; possession may be imputed when the contraband is found in a place which is immediately and exclusively accessible to the accused and subject to his dominion and control, or to the joint dominion and control of the accused and another. [Citation.] The elements of unlawful possession may be established by circumstantial evidence and any reasonable inferences drawn from such evidence.” (*People v. Newman* (1971) 5 Cal.3d 48, 52.)

The manager of the apartment complex testified that the one-bedroom apartment was rented to Salinas-Almaguer and his sister, and that Salinas-Almaguer was living at the apartment when the methamphetamine was found there. His car was also seen in the parking lot on the day the search warrant was executed. Paystubs and other documents in his name were found in a box on a dresser in the bedroom, and a gun recovered from the dresser was wrapped in a shirt bearing the logo of the employer who issued the paystubs. A large amount of cash that was consistent with drug sales was also found in the dresser, along with other documents and paperwork bearing Salinas-Almaguer’s name. Cash was found in a leather jacket in the bedroom closet, along with approximately an ounce of methamphetamine and a small amount of marijuana. Most of the methamphetamine was discovered hidden in the apartment’s only bathroom, and items consistent with the possession and/or manufacture of methamphetamine were found there. Scales were found in a kitchen drawer, and a vacuum sealer and a roll of vacuum-sealer bags were found in a kitchen cabinet. Expert testimony established that the methamphetamine found in the apartment was in a quantity that indicated it was possessed for sale, and the

cash, the firearm, the scales and vacuum sealer equipment corroborated such a conclusion.

The jury had a reasonable basis to conclude that Salinas-Almaguer had knowledge and control of the items found in his apartment, and that he possessed the methamphetamine for sale. Even though the apartment manager's testimony suggested that others may also have lived in the apartment, it was not determinative of defendant's innocence. (See *People v. Williams* (2009) 170 Cal.App.4th 587, 625 ["Possession may be physical or constructive, and more than one person may possess the same contraband"].)

Salinas-Almaguer also contends the proven enhancement that he was personally armed with a firearm while in possession of illegal drugs must be stricken because of "the absence of any tangible connection between himself and the weapon" But such an enhancement has been upheld by our Supreme Court when drugs and a firearm were discovered in close proximity to each other at the defendant's residence, even though the defendant was not present. (*People v. Bland* (1995) 10 Cal.4th 991, 999 ["when, at any time during the commission of the felony drug possession, the defendant can resort to a firearm to further that offense, the defendant satisfies the statutory language"].) The evidence showed Salinas-Almaguer lived in the apartment where the gun was found in a bedroom dresser drawer, wrapped in a shirt emblazoned with the logo of the employer who issued paychecks in Salinas-Almaguer's name. A substantial amount of cash was also found in the dresser, along with other papers bearing Salinas-Almaguer's name, and a large quantity of methamphetamine was found in the apartment bathroom, along with equipment associated with the manufacture and sale of methamphetamine. Under these circumstances, the jury could reasonably find the enhancement allegation true. (See *People v. Delgadillo* (2005) 132 Cal.App.4th 1570, 1575 [evidence was sufficient to support personal arming enhancement when "the firearms were in defendant's bedroom along with a significant sum of money, and in close proximity to cars in which defendant and his colleagues stored [drug-related items]"].)

B. *Jury Instructions Requested by the Defense*

Salinas-Almaguer also requested two pinpoint jury instructions intended to elaborate upon some of the elements of possession of drugs for sale. He asked the court to instruct the jury that: “Mere presence at the crime scene, with knowledge that a crime is being committed is not sufficient to prove guilt. The defendant may have been at the residence with one who was[] himself there with felonious intent; he may have seen the latter commit a felony and made no attempt to interfere and still be entirely innocent. A shared criminal intent must be shown to prove guilt. If the People have not proven beyond a reasonable doubt that the defendant had the requisite criminal intent to commit the charged offense then you must find him not guilty.” The second instruction requested by the defense stated: “Mere access or proximity to methamphetamine is not sufficient to infer possession. Dominion and control must be shown.” The trial court correctly refused the requested instructions.

The court instructed the jury pursuant to CALCRIM No. 2302 that in order to convict for possession for sale of a controlled substance, the prosecution must prove: “1. The defendant [Salinas-Almaguer] possessed a controlled substance; [¶] 2. The defendant knew of its presence; [¶] 3. The defendant knew of the substance’s nature or character as a controlled substance; [¶] 4. When the defendant possessed the controlled substance, he intended to sell it; [¶] 5. The controlled substance was methamphetamine; and [¶] 6. The controlled substance was in a usable amount. [¶] . . . [¶] Two or more people may possess something at the same time. [¶] A person does not have to actually hold or touch something to possess it. It is enough if the person has control over it, either personally or through another person.” The court determined that CALCRIM No. 2302 “sets forth the precise elements of the crime. And without any one of them, the defendant could not be held or found guilty,” and rejected defendant’s proposed instructions.

Salinas-Almaguer argues his requested instructions were necessary because CALCRIM No. 2302 “erroneously omits the traditional elements of ‘dominion and control’ and the ‘knowing exercise of control’ from its definition of possessing methamphetamine for sale.” But established law rejects any such need. (See *People v.*

Montero (2007) 155 Cal.App.4th 1170, 1174-1177 [CALCRIM No. 2302 “correctly states the elements of possession and knowledge in a manner reasonable jurors are able to understand”].) Although Salinas-Almaguer “takes issue” with *Montero*, he provides no persuasive criticism of its reasoning.

Salinas-Almaguer argues that *Montero* is of doubtful validity. He says that although *Montero* considered the term “dominion and control” an archaic and redundant way to describe constructive possession, the phrase was used in a later decision for just that purpose. (See *People v. Williams, supra*, 170 Cal.App.4th at p. 625.) No matter. The fact that one appellate court describes a legal concept with certain words does not mean that to be accurate, a jury instruction on that concept must employ those same words.

The cases Salinas-Almaguer cited to the trial court as authority for his requested instructions are also not on point. The case he cited in support of the instruction that his “mere presence” at the crime scene was not enough to convict involved aider and abettor liability, an issue not presented here. (See *People v. Ah Ping* (1865) 27 Cal. 489.) The case he cited for the instruction that “[m]ere access or proximity” to the drugs was not sufficient, involved a charge of receiving stolen property against a defendant who was “merely a passenger” in the car where the goods were found. (*People v. Myles* (1975) 50 Cal.App.3d 423, 428-429.) Here, contraband was found in Salinas-Almaguer’s apartment, and the jury was properly instructed on the elements of possession of a controlled substance for sale. (See *People v. Montero, supra*, 155 Cal.App.4th at p. 1176 [“This phrase [‘dominion and control’] is merely a different way of saying the defendant possessed the substance physically or constructively”].) CALCRIM No. 2302 “requires the defendant to have control over the substance. Under this language, the jury could not find defendant guilty simply due to his proximity to the substance. No reasonable juror would have believed that proximity alone equaled control.” (*Montero, supra*, at p. 1180.)

Salinas-Almaguer has not shown the court erred when it denied his request for pinpoint instructions. (See *People v. Bolden* (2002) 29 Cal.4th 515, 557-558 [proposed special instruction “would have added nothing to the jury’s understanding” of matter that

was “correctly and adequately explained” by standard instruction given by the court].) We therefore will not address whether any such error was harmless.

C. Motion to Compel Disclosure of the Identity of the Confidential Informant

When police procured a search warrant for Salinas-Almaguer’s apartment, they relied in part on “information from a Confidential Reliable Informant that large amounts of methamphetamine were being sold from the above listed address.” Salinas-Almaguer argues the trial court erred when it denied his motion to compel disclosure of the identity of the confidential informant.

Salinas-Almaguer moved to compel disclosure of the informant’s identity on the theory that the informant was a material witness because there was a reasonable possibility the informant could give evidence of Salinas-Almaguer’s innocence. (See *People v. Lawley* (2002) 27 Cal.4th 102, 159.) Salinas-Almaguer suggested “the informant may have knowledge that [he] was not personally involved in the sale of methamphetamine,” and “could testify that [he] was not the person involved in the drug sales.”

The district attorney opposed the motion, and argued that Salinas-Almaguer failed to demonstrate the informant was a material witness in this case. The charges were said to be based on the large amount of methamphetamine found in Salinas-Almaguer’s apartment, not the informant’s observations. The district attorney also requested that if the court were to find Salinas-Almaguer made an adequate showing for disclosure, an in-camera hearing should be held pursuant to *People v. Hobbs* (1994) 7 Cal.4th 948 and Evidence Code section 1042, subdivision (d).¹

¹ Evidence Code section 1042, subdivision (d), provides: “When, in any such criminal proceeding, a party demands disclosure of the identity of the informant on the ground the informant is a material witness on the issue of guilt, the court shall conduct a hearing at which all parties may present evidence on the issue of disclosure. Such hearing shall be conducted outside the presence of the jury, if any. During the hearing, if the privilege [to refuse to disclose the identity of a confidential informer] is claimed by a person authorized to do so or if a person who is authorized to claim such privilege refuses to answer any question on the ground that the answer would tend to disclose the identity of the informant, the prosecuting attorney may request that the court hold an in camera

At the hearing on the motion, the court stated it “met in chambers with the author of the search warrant.” When defense counsel inquired whether the court also met with the informant, the court responded: “I did not need to. [¶] What the Court did was speak with the officer. I went through every question that had been proposed.”² The court concluded it remained necessary to protect the identity of the informant, and stated that “[i]t does not appear that [the sealed attachment to the affidavit in support of the warrant] can be reasonably redacted in order to give some of the very, very short affidavit to defense counsel.” Salinas-Almaguer did not offer to present evidence on the need for disclosure or what it may produce. He instead requested the case be set for preliminary hearing. The parties have requested that we review the transcript of the in-camera

hearing. If such a request is made, the court shall hold such a hearing outside the presence of the defendant and his counsel. At the in camera hearing, the prosecution may offer evidence which would tend to disclose or which discloses the identity of the informant to aid the court in its determination whether there is a reasonable possibility that nondisclosure might deprive the defendant of a fair trial. A reporter shall be present at the in camera hearing. Any transcription of the proceedings at the in camera hearing, as well as any physical evidence presented at the hearing, shall be ordered sealed by the court, and only a court may have access to its contents. The court shall not order disclosure, nor strike the testimony of the witness who invokes the privilege, nor dismiss the criminal proceeding, if the party offering the witness refuses to disclose the identity of the informant, unless, based upon the evidence presented at the hearing held in the presence of the defendant and his counsel and the evidence presented at the in camera hearing, the court concludes that there is a reasonable possibility that nondisclosure might deprive the defendant of a fair trial.” The statute does not require that the informant be present or testify at the in camera hearing. (*People v. Alderrou* (1987) 191 Cal.App.3d 1074, 1079-1080.)

² This is apparently a reference to questions Salinas-Almaguer proposed in connection with a motion to traverse the search warrant that he later withdrew. Those questions included what the informant told the officer, and whether what was said included specific facts based on personal knowledge; whether the informant had visited the residence and why; whether the informant provided the officer with the identities of people present at the residence when the informant was there; whether the informant participated in the purchase of narcotics during the investigation; whether the informant gave the officer the defendant’s name or another’s name before the search; whether the informant said drug transactions took place at the residence; and whether the officer conducted surveillance of the residence or anyone associated with it.

proceedings conducted on Salinas-Almaguer's motion to disclose the informant's identity. We ordered that any such transcript be produced, but the superior court clerk's response to our order states there is no record of such a hearing and if one took place, it was not reported.

"A defendant seeking to discover the identity of an informant has the burden of showing that in view of the evidence in the particular case the informant would be a material witness on the issue of guilt and that nondisclosure would deprive him of a fair trial." (*People v. Kilpatrick* (1973) 31 Cal.App.3d 431, 436-437.) "It is incumbent on the defendant to make a prima facie showing for disclosure before an in camera hearing is appropriate." (*People v. Oppel* (1990) 222 Cal.App.3d 1146, 1152.) "The defendant bears the burden of adducing 'some evidence' of 'a reasonable possibility that [the informant] could give evidence on the issue of guilt that might exonerate the defendant.'" (*People v. Lawley, supra*, 27 Cal.4th at p. 159.) "The words 'might' and 'possibility' have vague and almost limitless perimeters that must be determined on a case-by-case basis and on review great weight should be afforded the trial court's determination." (*People v. Kilpatrick, supra*, at pp. 437.)³ "[A]n informant is not a material witness when 'he simply points the finger of suspicion toward a person who has violated the law. . .'" (*People v. Wilks* (1978) 21 Cal.3d 460, 469; see also *People v. Hardeman* (1982) 137 Cal.App.3d 823, 831 ["where the charge of constructive possession is based on the location of narcotics discovered pursuant to a valid search warrant, and upon the immediate contemporaneous personal observations of the arresting officers, the unnamed informant who furnished information relative only to the probable cause is not a material witness to the issue of guilt"].)

³ The *Kilpatrick* court also observed: "Superficially it might be argued that any informant who purports to speak with first hand knowledge of a defendant's possession of contraband or other evidence of a felony 'might possibly' be a material witness on the issue of the guilt of the defendant. The result of such reasoning, however, would be to make it impossible to obtain a search warrant on the basis of information from a reliable informant unless the police officer was prepared to disclose the informant's identity." (*People v. Kilpatrick, supra*, 31 Cal.App.3d at p. 437.)

With regard to the informant's alleged status as a material witness, Salinas-Almaguer offered only defense counsel's declaration that counsel was "informed and believe[d] to be true and therefore allege[d] that the informant could testify that Jose Salinas-Almaguer was not residing at the house during the time he witnessed drug sales and that Mr. Salinas-Almaguer was not involved in either possessing or selling methamphetamine." Such a declaration by counsel "cannot constitute the requisite factual foundation for the prima facie showing mandated on the issue of disclosure of a confidential informant's identity under [Evidence Code] section 1042(d)." (*People v. Oppel, supra*, 222 Cal.App.3d at p. 1153, fn. omitted [reversing the trial court's order dismissing an information due to the People's failure to disclose the identity of an informant, where the motion to disclose was based solely on the declaration of counsel]; see also *People v. Fried* (1989) 214 Cal.App.3d 1309, 1314-1315 ["[t]he mere assertion that the informant is a material witness on [the issue of guilt], without any plausible support therefor, does not trigger the requirements of [Evidence Code section 1042, subdivision (d)]".) Salinas-Almaguer has not shown the trial court erred when it denied his motion to disclose the informant's identity in this case.

D. Motion for a New Trial

Salinas-Almaguer also contends that the trial court's refusal to give the two pinpoint jury instructions that he requested required it to grant his motion for a new trial. There was no error in the court's ruling on the requested instructions.

On appeal, Salinas-Almaguer also argues that a juror's letter attached to his new trial motion "put the trial court on notice of potential misconduct that had occurred during jury deliberation," as to which "the court was obliged to conduct an inquiry," "on its own initiative," and that the court's failure to do so deprived him of a fair trial.⁴ The Attorney

⁴ The juror's letter to the trial court stated, in relevant part: "My purpose in writing to you is to let you know that as a juror on the above-referenced case, I have been troubled about my vote of guilty. This was the first time I have served on jury duty, and I was not prepared for the emotional pressure that I experienced. While I cannot say that the other jurors placed explicit pressure on me to change my vote from not guilty to guilty, I did experience indirect pressure. I believe all the jurors were under the

General contends Salinas-Almaguer waived this issue by his failure to raise it in the trial court.⁵ A similar claim to Salinas-Almaguer's was considered and rejected in *People v. Staten* (2000) 24 Cal.4th 434, 466, where the court observed: "The holding of an evidentiary hearing to determine the truth or falsity of allegations of jury misconduct is within the discretion of the trial court. [Citation.] 'The hearing should not be used as a "fishing expedition" to search for possible misconduct, but should be held only when the defense has come forward with evidence demonstrating a strong possibility that prejudicial misconduct has occurred.' " Even assuming this argument was not waived, no " 'strong possibility' " of prejudicial misconduct has been shown here. (*Ibid.*)

DISPOSITION

The judgment is affirmed.

Siggins, J.

We concur:

Pollak, Acting P.J.

Jenkins, J.

impression that we would be done on Tuesday, March 25th. Many of them were saying they had to get back to work, had clients waiting for them, had vacation plans, etc. At the end of the day on Thursday, March 27th I did not feel that I could say I needed another day to deliberate and I am regretting the fact that I did not take another day. . . . [¶] . . . Regrettably, I am not outspoken and have always been extremely shy. I had a hard time keeping my head clear in the deliberation room and making points I wanted to make and I do not want the defendant to have to suffer the consequences of that."

⁵ Salinas-Almaguer's new trial motion argued that other portions of the juror's letter suggested the jurors were confused by the jury instructions, and specifically stated: "Argument will not be presented within this motion with respect to the hurried deliberations."